

**MEMORANDUM**

DATE: August 12, 2008

TO: The Board of Supervisors

FROM: Leo P. Rogers, County Attorney

SUBJECT: Code of Ethics Update

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On March 28, 2006, the Board of Supervisors (“Board) adopted the Code of Ethics. The Code of Ethics was adopted after years of discussion between the Board and staff. The Code of Ethics was reviewed by all members of the Board, the County Administrator, and the County Attorney. The Code of Ethics sets forth guidelines which exceed the requirements in the State Code for the conduct of business by public bodies. An example of such State Code requirements is the Virginia Conflict of Interest Act (“COIA”). COIA deals with the disclosure of economic interests and the recusal of decision makers where narrowly defined conflicts exist in order to make sure that public officers and employees decisions will not be compromised by competing financial interests. As opposed to the Code of Ethics, COIA sets forth specific circumstances where conflicts exist, a method of determining whether a conflict exists and criminal enforcement procedures for violations. On the other hand, the Code of Ethics sets out broad standards for conduct and behavior which by their very nature can be subject to interpretation. In addition, the Code of Ethics does not have a clear procedure for enforcement and merely references sanctions which the Board may impose.

The Code of Ethics provides for the Board to perform a review annually and to consider recommendations from boards, commissions, and committees. The Board may then update the Code of Ethics as it deems appropriate. Liaisons to the various County boards, commissions and committees polled the members individually or in groups to get feedback on the Code of Ethics. Of the 89 appointed members of the 16 boards, commissions and committees subject to the Code of Ethics, 40 had no response, 41 responded with no changes being requested, and 8 responded with comments. Three of the boards, commissions or committees made discussion of the Code of Ethics an agenda item for their meeting. Attached is a spreadsheet which identifies the comments received. In addition, below is a summary of the comments made by members of other boards, commissions and committees, suggestions made by members of the Board of Supervisors, and suggestions of the County Administrator and County Attorney.

- **Paragraph 3. Conduct of Members**

- Include the words “including but not limited to.” (Suggested by the Cable Communications Advisory Committee)

Response: “Members shall refrain from abusive conduct, abusive conduct, *including but not limited to* personal charges...”

- Reword the last sentence to move up the word “public” in the sequence to give the citizens the message that they are the most important. (Suggested by the Parks & Recreation Advisory Commission)

Response: “Members shall refrain from abusive conduct, abusive conduct, personal charges or verbal attacks upon the character or motives of *the public*, other members of the Board of Supervisors, boards, commissions, and committees *or* the staff ~~or public~~.”

- Clarify the phrase "...and avoid even the appearance of impropriety..." or remove it because it can mean different things to different people. (Suggested by the Historical Commission)

Response: This phrase is intended to be broad to capture a wide variety of behavior that would otherwise be difficult to specify. It is possible to identify examples of the appearance of impropriety, but not an exhaustive list. This goes to the heart of the purpose of having an ethical code. Is it intended to have clear cut standards such as COIA or is it intended to apply more broadly?

- **Paragraph 7. Communication**

- Add the words “and promptly” after the word “publicly.” (Suggested by Cable Communications Advisory Committee)

Response: “Members shall publicly *and promptly* share substantive information that is relevant to a matter under consideration by the Board of Supervisors or boards, committees, and commissions

- **Paragraph 8. Conflict of Interest**

- Clarify what is meant by “material financial interest.” Make the whole second paragraph more explicit. Expand the definition of conflict of interest to include non-financial relationship such as present/past employment, connections to a neighborhood or HOA or social relationships. (Suggested by the Parks & Recreation Advisory Commission)

Response: This is more appropriately handled under COIA. It will be difficult to define all the personal relationships that would fit into this category. Also, social and neighborhood connections may give the public official better insight into the issue presented without having a personal stake in the transaction.

- **Paragraph 9. Gifts and Favors**

- Change “should never accept” to “shall not accept”.

Response: “A member ~~should never accept~~ *shall not accept* for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.”

- **Paragraph 12. Representation of Private Interests**

- Clarify that members of boards, commissions and committees have the ability to appear before the Board or other boards, commissions and committees to discuss matter of public business related to their role as a public official even if it relates to a private person, business or interest. (Suggested by the Economic Development Authority and requested by a Board member)

Response: “In keeping with their roles as stewards of the public interest, members of the Board shall not appear on behalf of private interests of third parties before the Board of Supervisors or any board, ~~committee, commission~~ *commission, committee*, or proceeding *involving* of the County, nor shall members of boards, ~~committees, or commissions~~ *commissions, or committees* appear before their own bodies or before the Board of Supervisors on behalf of the private interests of third parties ~~on matters related to the areas of the service of their bodies.~~ *Except that members of boards, commissions and committees may appear before other public bodies, including the Board of Supervisors, to advocate for a particular application or other matter of public business related to their role as a public official, when authorized to do so by their public body.*”

- **Paragraph 17. Implementation**

- Delete the requirement that each member of boards, commissions and committee sign a statement affirming they have read and understood the Code of Ethics. The Board could adopt a motion or resolution indicating that all appointees to boards, commissions and committees shall follow the Code of Ethics. (Suggested by Staff)

Response: “~~Members entering office shall sign a statement affirming they have read and understood the James City County Code of Ethics.~~”

- Instead of reviewing the Code of Ethics every year, schedule a review every other year, occurring on each even numbered year following the installation of members of the Board of Supervisors after an election. (Suggested by Staff)

Response: “In addition, the Board of Supervisors, boards, ~~committees, and commissions~~ **commissions and committees** shall ~~annually~~ biennially review the Code of Ethics . . .”

- **Paragraph 18. Compliance and Enforcement.**

- Revise the enforcement mechanism which provides that the chair of the Board of Supervisors or other boards, commissions and committees have the additional responsibility to intervene when actions of members that appear to be in violation of the Code of Ethics are brought to their attention. (Suggested by a Board member)

Response: Staff agrees that it is a difficult spot for the Board Chair or other chairs to be required to intervene and enforce the Code of Ethics. Staff proposes two alternative methods of enforcement:

1. Make the Code of Ethics something to which individuals can aspire. The Code of Ethics would still set the standard for public officials. Each public official would need to make his/her own determination of whether an action was ethical. The Code of Ethics could still be used to guide the conduct of public officials, but would not be used as a tool to punish public officials based on others judgment of the ethical standards.
2. Create an enforcement procedure that is removed from the affected public body, limits individual opinions of ethics and requires unanimous support for any sanction. For alleged violations by officials appointed to County boards, commissions and committee, the Board of Supervisors could consider the allegation and hear evidence or argument by the public official. In order to find a violation and/or impose any sanction, the Board of Supervisors would need make a unanimous decision. If an ethical violation was alleged against a member of the Board of Supervisors, the remaining members of the Board would need to unanimously vote to refer the allegation to an independent decision maker. That decision maker would hear the allegation, consider evidence and hear argument. At the end of a hearing, the decision maker would decide if an ethical violation exists and make a recommendation for a sanction, if any, to the Board. The Board would then need to unanimously vote to impose the sanction. Attached is information from the McCammon Group which could serve as such a third party decision maker.

In addition to specific comments discussed above, below are general comments which do not currently apply to any specific provision of the Code of Ethics:

- Make the Code of Ethics applicable to staff or at least senior level staff. (Suggested by the Economic Development Authority)

Response: Guidelines for the conduct of County staff are found in the County's Personnel Policies and Procedures Manual ("Personnel Manual") which is adopted by the Board of Supervisors. The Personnel Manual has standards that every employee must meet, provides for levels of discipline and has a grievance procedure which is required by State Code. In addition, County employees are under the direction and control of the County Administrator rather than the Board of Supervisors.

- In order to avoid undue and inappropriate influence and/or the public's perception of same, do not appoint any citizen to any County board, commission or committee who has provided financial and/or volunteer support to the campaigns of any of the sitting member of the Board of Supervisors. (Suggested by the Planning Commission)

Response: Staff believes this would unduly restrict the discretion of the Board. Certainly no person should be appointed to a public position who used undue influence, either financially or otherwise, to obtain that position. However, the contribution of time or money to a political campaign should not disqualify a person for serving as an appointed official.

After discussion of the comments and recommendation above, and any additional comment from the Board's work session, I will make appropriate revisions to the Code of Ethics for the Board of Supervisors to review and consider.

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Leo P. Rogers